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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 178.

TUSKEGEE INSTITUTE,

Petitioner,

v.

THE BANK OF NEW YORK, as Trustee of the Trust Established by ARTHUR B. EMMONS, by Indenture Dated May 8, 1916, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner TUSKEGEE INSTITUTE, prays that this Court grant rehearing of its order of October 9, 1961 denying the petition for a writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York in the above entitled case as prayed for in the petition filed June 24, 1961 herein.

Reasons for Granting Rehearing and Issuing the Writ.

This petition is made pursuant to Rule 58(2) of the Rules of this Court.

I.

The first ground now urged underlies and embraces the ground heretofore urged. The ground heretofore urged—that there was no rational basis for ousting New York law and applying Rhode Island law—is a special case of the more general ground now urged. In an effort to be precise we have heretofore presented a special case, and an example of the application, of the underlying general ground which is now presented by this petition for rehearing.

It is here submitted and urged as a ground for granting the petition for certiorari that respondents have obtained judgment on a matter which ceased to be justiciable upon their pleadings and the sole stipulated issue of "law governing" (paragraph 13 of stipulation, R. 161) and upon the making of the stipulation of facts. The stipulation was the "trial". Respondents failed to state facts sufficient to constitute a cause of action for the relief which they prayed, or sufficient to state a defense to the relief prayed in the Trustee's original petition. No facts were stipulated upon which the judgment granted in their favor could be founded. Their defense was insufficient in law—the "general law" of *Truax* v. *Corrigan*, 257 U. S. 312, 331-334.

Upon the submission of the stipulated record to the court of first instance, there no longer remained any "case" or "controversy". The adverse respondents stipulated their answers into legal insufficiency, requiring judgment in favor of Tuskegee in accordance with the original petition of the Trustee.

The pleadings and stipulation as to the sole issue—"law governing", and the stipulation of facts, preclude there being any legal or factual basis upon which relief could be

granted in favor of adverse respondents, or denied to the Trustee.

It is fundamental to the concept of the "general law", the protection of which petitioner claims, that it may not be deprived of property, except upon a case or controversy. Petitioner's fundamental right is a constitutional guaranty of a judicial process which has a coherent and consistent basis in the traditional methods of judicial thinking, operating upon facts and principles. *N. A. A. C. P.* v. *Gallion* —— U. S. ——, No. 303 (October 23, 1961).

Specific examples and applications of this underlying principle urged here are discussed in our petition for certiorari. In *Tot* v. *U. S.*, 319 U. S. 463, the infirmity was the substitution of an automatic "strained" presumption for the rational process of judicial thinking (discussed at pp. 23-24 of the Petition for Certiorari). In *Thompson* v. *Louisville*, 362 U. S. 199, there was no evidence whatever to support the conviction (pp. 16, 37 of petition for certiorari). Both of these cases are narrower applications of the fundamental principle of the "general law" which we rely on here, as expressed in *Truax* v. *Corrigan, supra*, and *N. A. A. C. P.* v. *Gallion, supra*. These cases hold that the underlying constitutional right is the right to the judicial process.

This Court's powers are plain, as shown by *Saunders* v. *Shaw*, 244 U. S. 317, *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 N. Y. 313 and *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, which we have previously relied on before this Court. We present below authorities which we have not previously presented to this Court, which show not only that the New York Court of Appeals had the power to pass upon the federal constitutional issues before it in this case, but it also had the duty imposed by statute to pass upon them, and was required by its own decisions to do so.

The New York Civil Practice Act provides:

> "§279. Certain objections not waived.
> An objection as to the jurisdiction of the court, except as otherwise provided in the preceding section, and the objection that a complaint, or a statement therein of a separate cause of action, or a counterclaim, does not state facts sufficient to constitute a cause of action, or that a *defense is insufficient in law upon the face thereof*, are not waived by failure to raise the same before trial." (Emphasis added.)

The Court of Appeals in *Teller* v. *Prospect Heights Hospital*, 280 N. Y. 456 (1939) stated at page 458:

> "The appellant asserts that the complaint is insufficient as matter of law in that it fails to state a cause of action. Our decision is confined to the question certified, but, in answering that question, we *must* determine before proceeding further as to whether the complaint states a good cause of action. (*Salimoff & Co.* v. *Standard Oil Co.*, 237 App. Div. 686; affd., 262 N. Y. 220; *Baxter* v. *McDonnell*, 154 N. Y. 432; *Emery* v. *Rochester Telephone Corp.*, 271 N. Y. 306), *although the question is first raised in this court* (*Small* v. *Sullivan*, 245 N. Y. 343)." (Emphasis added.)

In the first paragraph of *Small* v. *Sullivan*, cited above by the Court of Appeals, it was stated

> "CRANE, J. These appeals come here upon seven questions certified by the Appellate Division relating to the sufficiency of the defenses set up in the answers. The main argument, however, has centered about the sufficiency of the complaint which apparently was passed over by counsel in the courts below. The Appellate Division in its opinion says: 'As defendants have decided to reserve for the present all questions as to the sufficiency of the complaint,

> we assume that it states a cause of action of the general character indicated above.' However, under the rule that an attack upon an affirmative defense enables the defendant to question the sufficiency of the complaint (*Baxter* v. *McDonnell*, 154 N. Y. 432; *Manson* v. *Curtis*, 223 N. Y. 313, 319), the defendants in this Court have raised this question and we ***must*** dispose of it before dealing with the answers." (Emphasis added.)

Therefore, it is fundamental that where a pleading is insufficient in law, or where a party stipulates itself into legal insufficiency as did respondents here, the Court of Appeals not only *will* pass upon the question, but it has stated that it "*must*" pass upon the question. This provision of the C. P. A. is, of course, not affected by Rule 106 of the Rules of Civil Practice which *permits* a motion to be made to the court of first instance to determine the sufficiency of a pleading or jurisdiction over the subject matter at any time prior to trial.

The true meaning of Section 279 of the C. P. A. is that there are certain deficiencies which cannot be obviated. Neither waiver nor stipulation by the parties can create jurisdiction over a matter which is non-justiciable, or beyond the jurisdiction of a court, nor can parties create a cause of action where none exists. Obviously, where a party stipulates away any defense which his pleading might have raised, the Court of Appeals must and will pass upon this point.

The true criterion distinguishing between the matters which must be raised below and the matters which can be raised for the first time in appellate courts in New York, including the Court of Appeals, is whether the difficulty could have been "obviated" had it been raised earlier. Lack of jurisdiction over the subject matter, or failure of

a pleading to state a cause of action or a defense cognizable at law, cannot be obviated, and may be raised at any time.

By contrast, the preceding Section of the C. P. A. (§278) requires certain objections, including *personal* jurisdiction, to be raised by motion, or else they are waived. The matters referred to in Section 278 are those which can be obviated before trial.

In the case at bar, there was a stipulation of facts and a stipulation of the sole legal issue—"law governing" (paragraph 13, R. 161). The stipulation was in lieu of a trial. The effect of the stipulation is the same as if adverse respondents admitted on the witness stand the insufficiency of their defense and confessed judgment on the facts.

It is absolutely clear that matters which cannot be obviated may be raised for the first time in the New York Court of Appeals. The latest statement from the New York Court of Appeals, *Matter of Kaplan*, 8 N. Y. 2d 214 (1960) contained the following:

> "It appears that in the present case this lack of subpoena was not raised by appellant in the courts below but being jurisdictional and conclusive, it may be acted on by us especially since the omission was not one which could have been supplied if attention had been called to it below (see *Persky* v. *Bank of America Nat. Assn.*, 261 N. Y. 212; Cohen and Karger Powers of the New York Court of Appeals, Section 161)."

By citing *Persky* in this connection, the Court of Appeals shows that it is no more estopped to correct legal or constitutional mistake, than it is to correct jurisdictional defect. We have relied upon the *Persky* case, *supra* in our motion here (p. 6) and quoted the following from it:

> "Where the facts found or conclusively proven do not justify the conclusions of law upon which

> judgment rests, it is not too late to point out the error in an appellate court, even though the original error was due in whole or in part to lack of timely care or wisdom on the part of counsel" (261 N. Y. at 218).

Thus, the Court of Appeals has itself conclusively and recently held that fundamental and fatal defects in a judicial decision may be raised before it for the first time. This, of course, has always been the law of New York. See *People* v. *Jung Hing,* 212 N. Y. 393 at 404; *People* v. *Tobin,* 176 N. Y. 278; *Scott* v. *Morgan,* 94 N. Y. 508; *Beekman* v. *Frost,* 18 Johns 544.

We here rely upon the fact that, in accordance with Section 279 of the C. P. A., the defenses of respondents Humphrey, *et al.* were "insufficient in law upon the face thereof" in the language of Section 279 of the C. P. A., since they had stipulated such facts as to make the relief which they requested, *i. e.,* the application of Rhode Island law, repugnant to the due process clause of the federal constitution. We think it also of assistance to this Court to point out that the editors of 9 Carmody-Wait *Cyclopedia of New York Practice* 414, at Section 208, draw the same distinction which we drew in our motion, that it is only *statutory* unconstitutionality which must be raised in the lower courts in New York. We have distinguished statutory questions from unconstitutional judicial decisions in our motion heretofore granted by this Court.

Summary of this Ground.

1. The Trustee on behalf of petitioner and those similarly situated alleged in paragraph 23 of its original petition that New York law governed and prayed in its second prayer for relief for an order to that effect.

2. Adverse respondents denied this allegation and some of them alleged affirmative defenses that Rhode Island law governed.

3. The sole stipulated issue was "law governing".

4. The stipulated facts precluded reference to or application of any law except New York law.

5. The defenses of adverse respondents were stipulated into legal insufficiency (i.e. confession of judgment upon trial).

6. The Court of Appeals was bound by the Section 279 of the Civil Practice Act and its decisions above referred to, especially *Matter of Kaplan* and the *Persky* case, to render judgment in favor of petitioner and those similarly situated.

7. The judgment of the Court of Appeals is repugnant to the due process clause as construed in *Truax, supra, Tot, supra, Thompson, supra,* among others referred to in our petition for certiorari and hereinafter.

II.

As a separate and distinct ground available to petitioner and not heretofore presented, petitioner has been deprived of equal protection of the law of the State of New York and equal protection of the due process clause of the federal constitution—the "general law". *Truax, supra, N.A.A.C.P.* v. *Gallion, supra.* This denial of equal protection flows from failure to apply §279 of the C. P. A.; *Matter of Kaplan, supra; Persky, supra; Matter of Osborne,* 209 N. Y. 450; and the New York conflict of laws rule of *Hutchison* v. *Ross,* 262 N. Y. 381. In that case the Court of Appeals stated

that the conflict of laws rule must have "certainty" and "uniformity" and rights could not be denied at "pleasure or caprice". See pp. 19-20 of petition for certiorari. By excruciating coincidence, the agreement in that case was made in 1916, the same year as the agreement in the case at bar (262 N. Y. at 386).

III.

Petitioner relies on the ground available to it but not previously presented that objections by adverse respondents to this Court's jurisdiction rested upon a mistaken premise.

Such respondents argue, in effect, that there was a change in theory in this case. Paragraph 12 of the Stipulation (R. 160), where petitioner's attorneys together with attorneys for those similarly situated, declined to adopt any "theory" of the case except "law governing" (par. 13 of stipulation) states:

> "(12) Of the undersigned, the following attorneys: Alexander & Green; Lord, Day & Lord; Patterson, Belknap & Webb; Davis, Polk, Wardwell, Sunderland & Kiendl; O'Connor & Farber; Satterlee, Warfield & Stephens; Parker, Duryee, Benjamin, Zunino & Malone; Hawkins, Delafield & Wood stipulate to the facts herein without, however, conceding their materiality or relevance to the issues in this proceeding."

In "I" above we have shown that the Court of Appeals must consider the fundamental questions involved here, both by statute and under its own decisions. The entire basis for adverse respondents' challenge to this Court's jurisdiction rests upon an inarticulate premise that there

was a change in theory. This premise is contrary to paragraph 12 of the stipulation.

We urged in the Court of Appeals the unconstitutional *consequences.* The theory that New York law governed remained the same in all courts below and remains the same here.

The theory of our case from paragraph 23 of the Trustee's original petition, through the stipulation, through all courts is that New York law is the "law governing". This theory of governing law, therefore, appears on the face of the record from the inception of the case and is expressly referred to in all court orders. See pp. 2-3 of our "Reply of Petitioner to Brief in Opposition".

Adverse respondents are the only persons who seek to change the "theory" of the action here by arguing (Br. in Op. p. 12)

> "Strictly speaking, the dispute does not even involve conflict of laws."

But paragraph 13 of the stipulation, following the pleadings stated that "the issue of the law governing" should be submitted to the court of first instance.

IV.

Petitioner has not heretofore pointed out that the decision below permits the full faith and credit clause to preempt all constitutional ground and reduces the due process clause to a nullity.

This Court has left standing a decision which gives extraterritorial and retroactive effect to the law of a particular state over property which was not within that state, an agreement which was not executed in that state and which was a stranger to its law, and over a trustee which was never in that state.

The decision left standing permits a legislature or a court to act upon property, persons, and instruments previously thought to be secure and to enjoy the protection of the law of the state specifically embraced by such instruments, the state wherein the property is situated, and the state where the persons who hold such property permanently are situated.

The case below stands for the proposition that a state, by retroactive fiat can reach outside its borders and divest property which has heretofore been the exclusive concern of the state, in this case New York, where the trustee at all times has been, where the property has at all times reposed, and the law of which was expressly incorporated by the parties to an instrument. All this has been done retroactively, because the law of Rhode Island, as shown throughout our petition, was not pronounced until fifteen years after all relevant events.

If New York law *must* accept this extraterritorial and retroactive Rhode Island law, then the due process clause is wholly subjected to the full faith and credit clause. If New York *elects* to accept this Rhode Island law, and attribute to it retroactive and extraterritorial effect, then there is no rational basis for New York's action, and the due process clause is similarly rendered nugatory.

Put another way, we contend that it is absurd to say that the full faith and credit clause preempts all constitutional ground, leaving no room for due process. Since due process of law in New York precludes the retroactive and extraterritorial effect of the Rhode Island judicial decision establishing the substantive law of Rhode Island, petitioner is entitled, as a bare minimum of ordered liberty and protection of its property rights to have New York courts find "law governing" in accordance with rational judicial process. *Truax* v. *Corrigan, supra.*

To support the decision below it must be found that Emmons prophesied and foretold the promulgation of an extraterritorial and retroactive property rule by a state wholly devoid of jurisdiction over the property, or the agreement or the trustee. The assumed prophecy, then, is hardened into an automatic presumption, in spite of the fact that Emmons expressly adopted New York law. Law governing property was selected on assumed prophecy. Neither Emmons, nor the Trustee, nor any party to this proceeding was a party to the Rhode Island proceeding where the extraterritorial rule was promulgated.

The constitutional limitations on choice of law have been before this Court many times. The questions usually come up in terms of "jurisdiction" or "substance" as contrasted with "procedure". The indissoluble connection between due process and full faith and credit is frequently referred to. We submit that the proper balancing of these two provisions underlies all the thinking of this Court from *Pennoyer* v. *Neff*, 95 U. S. 714, to the present.

This connection is clearly described in an article by Russell J. Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 Iowa L. R. 449 (1959). We do not elaborate this petition for rehearing to discuss the points made by Professor Weintraub, except to say that he has distilled from this Court's most recent opinions, and from *Home Ins. Co.* v. *Dick*, 281 U. S. 397, a rule identical to that proposed in the *Restatement* (*Second*) *Conflict of Laws*, §43(e), (Tent. draft No. 3, 1956) which we quote and discuss at pp. 24-26 of our petition for certiorari. His conclusion is that a state violates the due process clause if it applies the law of another state to a state of facts over which such other state would have had no legislative jurisdiction.

This conclusion of the draft Restatement and of the article above referred to is required by the opinion of this Court, per Mr. Chief Justice Stone, in *International Shoe Co.* v. *Washington*, 326 U. S. 310. There were not in the case at bar any quantitative or qualitative contacts with Rhode Island, from which Emmons departed in order to do acts in New York and refer to its law. No acts were done in Rhode Island. No consequences were caused in Rhode Island. This case does not involve the *dis*connection or *es*trangement of Rhode Island from the facts. Rhode Island was always *un*connected with and a total stranger to the facts.

We do not cite foreign authority as precedent for interpretation of a written federal constitution. But since due process is, at the least, a concept of ordered liberty, we feel no surprise that other jurisdictions should come to the same conclusion as that which we believe is compelled in the case at bar. Viewing what was done below as the extraterritorial and retroactive divesting and confiscation of New York property by a new law of Rhode Island, we invite this Court to consider:

> *Bank voor Handel en Scheepvaart N. V.* v. *Slatford* [1952] All E. R. 956;
> *Re Helbert Wagg & Co.'s Claim* [1956] 1 All E. R. 129 (Ch.) *at* 138.

See also

> *Government of the Republic of Spain* v. *National Bank of Scotland*, 1939 S. C. 413.

These cases are referred to in an article which squarely faces "time" as well as "space" in the conflict of laws. Erwin Spiro, *The Incidence of Time in the Conflict of Laws*,

9 *Int. and Comp. L. Q.* 357 (1960). We will not burden the Court with an analysis of that author's reasoning or conclusions, except to say that his view is that courts have held that a new law cannot be applied in another country, if the movable concerned is situate outside the legislating state at the time of legislation.

The same conclusion appears in Dicey's *Conflict of Laws* (Seventh Ed. 1958), where at page 663 it is stated "• • • and in practice our courts have tended to construe decrees so as not to give them extraterritorial operation whenever possible."

(Without here going into the English concept of "proper law of the contract" it is of persuasive value that at page 728 of Dicey, *supra*, it is also pointed out that if it is expressly stated "that one part or aspect of a contract is to be governed by a certain law, it may be presumed that this was contemplated as the proper law of the contract as a whole • • •".)

Since we argue in our petition that when Emmons came into New York in 1916 he incorporated in his agreement and conveyance the property rule of *Matter of Osborne*, 209 N. Y. 450 (1913), the existing law of New York, we are unable to see how a rule of Rhode Island property law announced for the first time fifteen years later in *Rhode Island Hospital Trust Co. et al.* v. *Tucker*, 51 R. I. 507 (1931) can be held to govern this case, unless it is now to be law in our federal system that Rhode Island law can be given extraterritorial and retroactive effect to confiscate New York property.

We submit further that the New York courts are not free to apply or fail to apply a settled New York conflict of laws rule, but having adopted the rule, must apply it consistently to similarly situated cases. Even if a particular conflict of laws rule were not itself required by due process.

the even and consistent application of such rule is required by due process. Here, we refer again to the fact that the trust agreement in *Hutchison* v. *Ross*, 262 N. Y. 381, which requires New York law to govern the property involved in this case, was itself executed in 1916, the same year as the execution and conveyance by Emmons (262 N. Y. at 386). See pp. 8-9 hereof.

Professor Weintraub, properly we believe, points to an element in due process decisions of this Court which he describes as "unfair surprise". He believes it proper that this Court should refuse to apply law of a state with fortuitous contact with a transaction. He believes this element of surprise to be significant in *John Hancock Mut. Life Ins. Co.* v. *Yates*, 299 U. S. 178, and *Hartford Acc. & Ind. Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, and other cases therein referred to (Weintraub, *supra*, pp. 457-460). But neither that learned author, nor this Court, have found unfair surprise in situations where a party has qualified to do business in a state or otherwise intentionally come into that jurisdiction to do business in that jurisdiction. See, for example, *Watson* v. *Employers Liab. Assur. Corp.*, 348 U. S. 66. It could never be contended that the element of unfair surprise could arise in this case by applying New York law, since Emmons came into New York, expressly adopted New York law, made an agreement in New York, and transferred property in New York which has continued to be in New York. The only element of unfair surprise that can arise is to give extraterritorial and retroactive effect to a Rhode Island property rule promulgated fifteen years after all events and six years after Emmons died.

Conclusion.

For the foregoing reasons and those set forth in the petition for writ of certiorari it is respectfully urged that rehearing be granted, and that upon such rehearing a writ of certiorari issue to the Court of Appeals of the State of New York and the case be heard by this Court. In the alternative, we respectfully urge that the petition for certiorari be granted, the judgment herein be vacated, and the case remanded to the Court of Appeals of the State of New York with directions to set forth any grounds which afford a basis for a decision on state law. *Musser* v. *Utah*, 333 U. S. 95; *Herb* v. *Pitcairn*, 324 U. S. 117; *Burton* v. *Wilmington Parking Authority*, 365 U. S. 730 (dissenting opinion by Mr. Justice Frankfurter).

October 31, 1961

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the rules of this Court.

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